IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 20 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GIRISHBHAI RAMANBHAI KACHHIYA PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 20 of 2000

HL PATEL ADVOCATES for Petitioner No. 1

MS PB SHETH A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 03/11/2003

ORAL JUDGEMENT

The appellant abovenamed has preferred this Criminal Appeal under Section 374 of the Code of Criminal Procedure, 1973 (for short "the Code") in order to challenge the judgment and conviction order dated

07.12.1999 recorded by the learned Sessions Judge, Bharuch in Sessions case no.227 of 1997, under which the learned Judge was pleased to convict the present appellant for the offence punishable under Section 376 of the Indian Penal Code and was pleased to sentence him to suffer R.I. for seven years. The appellant was further directed to pay fine of Rs.1,000=00 and in default of payment of fine, he was required to suffer further R.I. for one year.

2. By the said judgment, the learned Sessions Judge was pleased to acquit the present appellant of the offence punishable under Section 363, 366 and 506 of the Indian Penal Code.

3. The facts of the case of the prosecution before the Trial Court may be briefly stated as follows :-

3.1. Prosecutrix Sumitraben D. Patel was said to be about 13 years of age and at the relevant point of time. It was noticed that she was suffering from cold and she also complained of pain in stomach. Therefore, she was taken to Doctor at Amod, District Bharuch and then at Sarbhan and Vadodara. On examination which was carried on in July, 1994 it was found that she was pregnant and she was carrying about 28 weeks pregnancy. Ultimately, she was treated and during the course of her treatment she died. During the course of her medical examination, the victim was taken to the aforesaid places by her mother and in that process, as per the case of the prosecution, the victim disclosed to the mother that rape was frequently committed on her by the present appellant. Even to the Doctor the said history was given by her. It seems that the parents of the victim contacted the parents of the appellant and some negotiation took place. It seems that the parents were agreeable to get the victim married with the appellant. However, ultimately, the father of the appellant was also agreeable with respect to the said proposal but the appellant was not agreeable with the said proposal and he even denied the paternity of the child in the womb of the victim and, therefore, the said proposal was not materialised. Thereafter, the victim died on account of some developments in her health in the hospital itself. On account of the aforesaid fact situation, the father of the victim had filed First Information Report before Bharuch Police Station. According to the father of the victim, it was not registered there and, therefore, a complaint was filed, being Inquiry case no.29 of 1994 by the father of the victim on 08.07.1994. The learned Magistrate at Amod, directed the P.S.I. of Amod Police

Station to undertake investigation under Section 156 (3) of the said Code. Ultimately, investigation was undertaken and at the end of the investigation, chargesheet was filed before the learned Judicial Magistrate, First Class, at Amod. Since the offence alleged against the appellant was exclusively triable by a Court of Sessions, the case was committed to the Court of Sessions and, there it was registered as Sessions case no.227 of 1999. The learned Judge supplied police papers to the appellant. Charge was prepared and framed at Exh.2. It was read over and explained to the appellant. He pleaded not guilty and, therefore, evidence was recorded. At the close of the evidence, the Trial Court recorded further statement of the appellant under Section 313 of the said Code. Arguments were heard and the Trial Court found that the appellant was guilty for the offence punishable under Section 376 of the Indian Penal Code. Further the Trial Court acquitted the appellant for the offences punishable under Sections 363, 366 and 506 of the Indian Penal Code. After hearing the appellant on the quantum of punishment, the Trial Court inflicted the aforesaid punishment.

4. Feeling aggrieved by the said judgment and conviction order of the Trial Court, the appellant has preferred this appeal before this Court. It has been mainly contended before this Court that the Trial Court did not have sufficient evidence to prove the guilt of the appellant, that the victim has passed away and hence, there is no direct evidence against the appellant about the said offence. That the evidence of the mother and father of the victim is quite insufficient to connect the appellant with the offence. That even the statement said to have been made by the victim to the Doctor is also insufficient to connect the appellant with the offence in question. That the investigation carried out by the Head Constable clearly reveals that paternity test has not been undertaken in order to show that the appellant was guilty of committing rape on the victim. That even otherwise, it has come on record that the victim used to go to attend household work at other places and, therefore, she might have come in contact with the other persons in the neighbourhood and the appellant has been falsely implicated in a serious offence like the present one. In that view of the matter, there being no evidence, it cannot connect the appellant with the offence in question and the present appeal may be allowed and the appellant may be acquitted accordingly. In the alternative, it has been contended that the punishment of 7 years R.I. is on higher side and, therefore, looking to the fact that the appellant is in jail right from the

beginning, lenient view may be taken in the matter.

5. On receiving the appeal, it was admitted and on preparation of the paper book, it has been placed for final hearing. Accordingly today, the matter was taken up for final hearing. Learned advocate Mr.V.H Patel has appeared on behalf of the appellant and Ms.P.B. Sheth learned A.P.P. has appeared on behalf of the State.

6. Now so far, the factual aspects are concerned, it is quite undisputed that the victim was below age of 13 years at the relevant point of time and when she was taken to the Doctor it was noticed that she was pregnant. As per the case of the prosecution, the victim had conveyed it to the mother that rape was committed frequently on her by the present appellant. However, she passed away during the course of her treatment and, therefore, naturally, her evidence could not be recorded. In order to prove the aforesaid aspects, the prosecution has examined the following witnesses :-

(1) P.W.1 Dahyabhai Mangalbhai - Exh.9 (Father).

(2) P.W.2 Niruben Dahyabhai - Exh.11 (Mother).

(3) P.W.3 Ambalal Pitambardas - Exh.13 (hostile).

(4) P.W.4 Savitaben Shivlalbhai- Exh.14 (hostile)

(5) P.W.5 Dr.V.L. Patel - Exh.15.

(6) P.W.6 Dr.K.P. Desai - Exh.19.

(7) P.W.7 Dineshbhai Patel - Exh.21.

(8) P.W.8 Musabhai Hasanbhai - Exh.22.
(head constable)

6.1. The prosecution has also produced documentary evidence on record as follows :-

(i) Birth certificate issued by the concerned panchayat - Exh.10.

(ii) Certificate issued by Dr.Patel - Exh.16.

(iii) Certificate of the Community Health Centre, Amod - Exh.18.

(iv) Postmortem notes - Exh.20.

(v) Panchnama - Exh.27 & Exh.28.

(vi) Yadi by Medical Officer - Exh.29.

(vii) F.I.R. - Exh.33.

7. Now so far the initial facts are concerned, the prosecution has relied upon the evidence with respect to the age of the victim. Now so far the age is concerned, the prosecution has examined P.W.1 - Dahyabhai Mangalbhai at Exh.9 who has clearly deposed that in 1994 the age of his daughter - Sumitraben was 14 years. He has also given the evidence that the birth was registered and name of the victim was also stated in the said certificate. He has also produced the said certificate issued by the concerned panchayat at Exh.10 on record which clearly shows that the date of birth of victim Sumitraben is 20th July, 1981.

8. The aforesaid aspect has not been challenged during the cross-examination of the said witness. Even according to the evidence of medical certificate of the Medical Officer at Exh.18, the age of the victim was shown to be between 14-16 years in July, 1994. The postmortem note also shows that she was about 14 years of age. This can be gathered from column 7 at page 44 at Exh.20.

9. Now so far the birth certificate issued by the concerned panchayat is concerned, it is primary evidence on record substantiated by the Medical expert's opinion and the evidence of the father and the mother of the victim. Reading the evidence together, it is clearly established on record that the victim was below the age of 14 years at the time when the incident is said to have been committed. Thus, in July, 1994 she was hardly 13 years of age. The Trial Court has relied upon the aforesaid evidence in order to come to a conclusion that the victim was below the age of 14 years at the time when the offence is said to have been committed. In view of the evidence of the father of the victim, the mother of the victim and the Medical Officer on the point of the age of the victim and when the said evidence has remained unchallenged on record, the Trial Court was justified in coming to a finding that the victim was below the age of 14 years when the offence was committed. Now it is very clear that when the age of the victim is below the age of 16 years, then the question of her consent is absolutely immaterial. In other words even if the evidence shows that rape was committed on the girl below the age of 16 years with her consent then also it would remain an

offence punishable under Section 376 of the Indian Penal Code. Clause sixthly of Section 375 of Indian Penal Code makes it clear that if such offence is committed with or without the consent of the victim then also it would be an offence, if the victim is not of 16 years of age. That means that if the girl is below the age of 16 years and if the rape has been committed with the consent of the victim, then also it is an offence. In the present case, we find that it has been conclusively proved on record that the girl was below the age of 14 years at the time when the offence is said to have been committed and, therefore, even if we take it that there was consent on the part of the victim, it would still be an offence and the question of her consent will not be material for any purpose. Any way, the Trial Court was justified in holding that the victim was below the age of 14 years at the time when the said offence is said to have been committed.

9.1. So far the involvement of the appellant is concerned, the learned advocate for the appellant has heavily argued that there is no material to show that rape was committed on the victim by the present appellant. He has also argued that the victim was working at several places and hence, she might have come in contact with other male persons in the neighbourhood or elsewhere and, therefore, in absence of any material on record, the trial Court has committed an error in holding that rape was committed on the victim by the appellant only and by none-else. It is also his argument that paternity test has not been undertaken by the Investigating Officer as has been deposed by him that in cross-examination at Exh.22. It is no doubt true that the Investigating Officer has clearly admitted before the Trial Court during the course of his cross-examination that he had not undertaken any paternity test to prove the paternity of the child in the womb of the victim. There is no doubt about the same and the evidence on record does not show that such test was undertaken. At the same time, it is also required to be considered that Investigation was undertaken by a Police Head Constable who was suspended initially and, thereafter, it was undertaken by another Police Head Constable Musabhai Hasanbhai at Exh.22. He seems to be unaware of the said test or he might not have thought it proper to undertake the said test. The fact remains that paternity test has not been taken with a view to establish the paternity of the child in the womb of the victim. At the same time, merely because there was some lacuna or the flaw in investigation, the benefit thereof cannot go to the accused - appellant in the present case, if the offence

is otherwise proved on record. Even we find that the prosecution has examined the parents of the victim and particularly, the mother has clearly deposed before the Trial Court that she had made inquiry from the victim and the victim had clearly given the name of the appellant as the person through whom she had become pregnant. On this aspect of the case, cross examination was restricted on the suggestion that the victim was not pregnant through the appellant. At the same time, it is also required to be consider that if the victim had not become pregnant through the appellant, then the victim had no reason to give false name of the appellant to her mother and the mother had no reason to give false name of the appellant to her husband, to the police and to the Court. The fact that the appellant's name was disclosed by the victim to the mother and from the mother to the police and then to the Court, clearly establishes that there was evidence before the Trial Court to the fact that it was the appellant and the appellant alone who had committed rape on the victim.

10. So far the father is concerned, he had stated at Exh.9 in the course of examination-in-chief that on inquiry from the victim she had given the name of the appellant as the father of the child in her womb. In his cross-examination he had made it clear that the victim had not told in his presence that rape was committed on her by the appellant. At the same time, the mother has also stated before the Trial Court that she had conveyed it to the father of the victim that rape was committed by the appellant on the victim. This would mean that the victim conveyed the fact to the mother and the mother, in turn, conveyed it to the father and in that view of the matter there is a complete link of chain of evidence and it may be that the father may not have directly inquired into this matter from his unmarried girl of 14 years. At the same time, the mother would naturally inquire about the same and naturally an unmarried girl of 14 years may legitimately convey the fact to her mother. In view of the aforesaid situation, it cannot be said that the parents have given false name of the appellant as a person who had committed rape on the victim. Atleast there is evidence of these two witnesses involving the appellant as a person who had committed rape on the victim. It is more so when the name of the appellant has been disclosed by the mother saying that it was disclosed to her by the victim herself. Again there is no serious cross-examination on this aspect of the case. If we go through the evidence of the parents, it cannot be said that the Trial Court had committed any error in depending upon the said evidence of the parents. Here we have to

accept that the victim did not convey it directly to the father, but the victim conveyed it to the mother and the mother conveyed it to the father thereafter. The parents came to know through the victim about the involvement of the appellant in the commission of the offence in question.

12. The evidence of Dr. Patel at Exh.15 and the certificate issued by him on 25.07.1994 at Exh.16 are again important pieces of evidence. It would be very much relevant and important to refer to the statement of fact made by the victim to this Doctor which has been reduced into writing. The English version of the said statement of fact made by the victim to the Doctor may be read as follows :-

> "I used to go to work at the place of Manilal Gopaldas. In the meantime, she was being sent to the son of Manilal. At that point of time, his son namely Girish (the appellant) used to close the doors of the house and used to promise her that he would marry with her and thereafter, he (the appellant) used to have sexual intercourse with her. On several occasions this position continued since last one year and before about 15 days she was kept inside the house and he had sexual intercourse with her."

13. In view of the above statement made by the victim to the Doctor, it is clear that this statement of fact made by the victim to the Doctor clearly supports the version of the parents of the victim. The learned advocate for the appellant has argued that the statement of the victim to the Doctor cannot be treated to be her dying declaration. Even accepting the said argument of the learned advocate for the appellant, it transpires that it was a history of event or a history of case given by the victim to the Doctor. It was recorded in writing by the Doctor, which would therefore be a relevant statement made by the victim to the Doctor and, therefore, when it is corroborated by the version of the parents of the victim and, in turn, when the statement of the victim lends supports to the evidence of the parents of the victim then it becomes clear that the statement of the victim to the Doctor and the version of the parents corroborates one another. On one hand it is natural that the girl of 13 to 14 years would, at the time of necessity, convey the true fact to her mother. Sameway, she was required to convey the said fact to the Doctor. The victim was consistent in giving the name of the appellant as the person who had committed rape on her.

14. Considering the aforesaid aspects of the case, it is very clear that the fact of rape committed by the appellant on the victim has been amply proved by the evidence of the parents of the victim and by the evidence of the aforesaid statement of her own made to the Doctor, which has been proved through the evidence of Doctor. Then there is the evidence of Dr. Desai who had carried out postmortem on the dead body of the deceased. His evidence has been recorded at Exh.14 and the postmortem has been produced at Exh.20. The evidence of Dr. Patel and the evidence of Dr.Desai together prove that the victim was pregnant at the relevant point of time. This also shows that she had a sexual intercourse with someone, on account of which she had become pregnant. The fact of pregnancy leads us to believe that she had sexual intercourse with a male person. This would further lead us to believe that it was the appellant and the appellant alone who had committed rape on her. It has been argued that the victim was working at several places also. This has come from the evidence of the mother of the victim. There cannot be any dispute about the same. However, it is the fact that as per the evidence of Niruben at Exh.11, she used to send her daughter Sumitraben in the neighbourhood for labour work if it was so required. This would mean that actually she was going to work at different places in the neighbourhood. This does not mean that she had physical relation with other persons staying in the neighbourhood. If the victim really had such relation with other persons in the neighbourhood, she would have stated about the names of those persons. Same way she would not have falsely implicated the present appellant. The records also do not show that there was some enmity between the two families. Same way the records also do not show that the victim had something wrong with the appellant and that is why the appellant has been wrongly named by the victim before her mother as well as before the Doctor. If the appellant was not involved in the matter at all, then the victim, the Doctor and the parents had absolutely no reason to falsely implicate the present appellant in a serious offence like the present one.

15. It is true that paternity test would have been an important piece of evidence and an important link in the change of evidence. At the same time, simply because such evidence has not been brought on record, it would not be fatal on the case of the prosecution. It is more so when the statement of the parents and the Doctor is consistent to prove the guilt of the present appellant. The learned advocate for the appellant has also argued

that the victim may have given false name of the appellant to the Doctor and to the parents. However, the records do not show that the victim had a reason to do so. After all the victim was about 13 to 14 years of age at the relevant point of time. It is required to be considered that she had never stated either to the Doctor or to the parents that the appellant had committed rape on her forcibly against her will and without her consent. If the victim had any axe to grind against the appellant then there would have been exaggerated story narrated by her to the Doctor as well as to the parents. Instead, she simply stated to both of them that the appellant had physical relation with her. This signifies that her statement is quite natural. Therefore, the evidence on record of the Trial Court clearly indicates that the victim was below the age of 14 years at the time when the offence was committed. It is also clearly established on record that she was pregnant. It is further established on record that as per the statement made by her to the parents and to the Doctor, rape was committed on her by the present appellant. Looking to the aforesaid evidence on record and looking to the aforesaid statement made by the victim to the parents and to the Doctor and considering the F.I.R. and the statement recorded by the Doctor referred to hereinabove, it is conclusively proved on record that it was the appellant and the appellant alone who had committed rape on the victim.

15. The learned advocate for the appellant has drawn my attention to the evidence of Dinesh Patel at Exh.21 who had deposed that an inquiry was made with the appellant by the family members of the victim and at that time, the appellant had clearly stated that he had no physical connection with the victim and it may have been done by someone else in the neighbourhood. It is after all a statement of the appellant and the appellant was naturally interested in so saying to the said witness. The said statement made by the appellant is contradictated by the statement of the victim made to the Doctor as well to the parents. It is more so when the evidence of Doctor did not meet with cross-examination from the said angle. It is required to be consider that the evidence of Doctor was first recorded and thereafter the appellant submitted an application at Exh.23 before the Trial Court on 20.07.1999 requesting the Court to permit recall for further cross-examination, witnesses nos.5,6, 7 and 8. It seems that the Trial Court allowed the said application and permitted the appellant to further cross-examine witnesses nos.5, 6, 7 & 8. It is interesting to note that witness no.5 is Dr. Patel before whom the said statement at Exh.16 was made by the

victim and witness no.6 is Dr.Desai who had undertaken postmortem of the dead body of the deceased, Exh.19. Witness no.7 is Dineshbhai Patel at Exh.21 and witness no.8 is Head constable at Exh.22. It is interesting to note that out of them witness no.7 Dineshbhai Patel at Exh.21 had deposed that the appellant had made a statement that he had no connection with the victim. At the same time, he has further stated before the Trial Court that the father of the appellant had agreed to have a marriage between the two in a span of two to three days. This fact has not been challenged by way of cross-examination by the appellant though permission was obtained to recall to cross-examine such witness.

16. Incidentally, after the said application was granted by the Trial Court on 20.07.1999 the appellant submitted and application at Exh.25 (at page 56) on 28.09.1999 that the appellant did not desire to further cross-examine those witnesses. Though an opportunity was provided to the appellant to recall the witnesses for cross-examination, the appellant did no avail such opportunity and did not further cross-examine the said witnesses. On account of the said position, the aforesaid version of Dineshbhai Patel at Exh.21 has remained uncontroverted & unchallenged on record. If the appellant was not involved in the offence in question then naturally his name would not have been conveyed by the victim to the parents and to the Doctor. Moreover, if the appellant was not involved in the said offence, the father of the appellant would not have agreed to have a marriage between the appellant and the victim. The fact that the father of the appellant had agreed to see that the marriage between the two would take place within a span of two to three days, clearly indicates that there is an indirect admission of the father of the appellant about the involvement of the appellant in the commission of the said offence. It is true that the appellant himself was not agreeable about his involvement in the offence. Nevertheless, the father of the appellant was agreeable to have a marriage between the two within a span of two to three days. Thus, there is an indirect proof of involvement of the appellant in the commission of the offence in question. In the aforesaid view of the matter it is clear that there was sufficient evidence on record to show that the appellant had committed rape on the victim and since the victim was below the age of 14 years and since the said fact of age of the victim was not at dispute at any point of time, the Trial Court was justified in holding that the prosecution had conclusively proved that rape was committed on the victim by the appellant. The trial Court was, therefore,

justified in convicting the appellant for an offence punishable under Section 376 of the I.P.C.

17. The learned advocate for the appellant has alternatively argued that punishment of seven years R.I. is on higher side. In fact the offence punishable under Section 376 I.P.C. is punishable with imprisonment for life. This cannot be taken out of consideration. The second aspect to be considered is that the victim was below the age of 14 years when the offence was committed on her. In fact, rape was committed frequently on her. It is also a matter on record that rape was committed on the victim by the appellant on the false promise and pretext that the appellant would marry the victim. Probably the victim would not have allowed the appellant to have physical relation with her, had there been no promise of marriage to her. Therefore, she was indirectly induced also. Then it is also a matter on record that she developed pregnancy and after giving birth to a child she died and the child also died. Having regards to the aforesaid facts and circumstances of the case, and considering the fact that though the father of the appellant was indirectly agreeable to have a marriage between the two and that the parents of the victim were also agreeable to the said proposal, the appellant declined to marry the victim. Considering the above conduct on the part of the appellant, I am of the view that this is not a fit case for showing any leniency to the present appellant. In above view of the matter, on one hand there is no flaw in the judgment of the Trial Court. The trial Court has properly appreciated the factual and legal aspects of the case. The evidence has been properly appreciated. In fact, the evidence on record produced by the prosecution inspires confidence and, therefore, the Trial Court was justified in depending upon the said evidence produced on record by the prosecution. Therefore, once the appreciation of evidence is proper, then interference is not warranted even in appeal. Moreover, it is found that when the evidence inspires confidence and the Trial Court was even justified in depending upon the evidence of the prosecution, the only result is that the Trial Court is justified in convicting the appellant. In that case, there is no reason to take a view different from the view adopted by the Trial Court. In that view of the matter, I find no merit in the present appeal and the appeal deserves to be dismissed.

For the foregoing reasons, the appeal is ordered to be dismissed. The judgment and conviction order recorded by the Trial Court against the appellant are

confirmed.

[D.P. BUCH, J.]

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